In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 607

RAY JACKSON CRIBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury, in the United States District Court for the Middle District of Georgia, under an indictment charging that he and three others [1] possessed an unregistered still, in violation of 26 U.S.C. 5179(a) and 5601(a)(1) (Count 1); that they carried on the business of a distiller without filing bond, in violation of 26 U.S.C. 5173 and 5601

[1] Petitioner was tried separately. Two of the three others pleaded guilty to one or more of the charged offenses (R. 4, 6).

(a)(4) (Count 2); that they carried on the business of a distiller with intent to defraud the United States, in violation of 26 U.S.C. 5602 (Count 3); that they worked in a distillery which did not display an identifying sign, in violation of 26 U.S.C. 5180 and 5681(c) (Count 4); that they possessed whiskey in unstamped containers in violation of 26 U.S.C. 5205 (a)(2) and 5604(a) (Count 5); and that they possessed distillery apparatus and raw materials with the intention of using them in the business of distilling whiskey, in violation of 26 U.S.C. 5686(a) (Count 6) (R. 1-14). On October 27, 1967, petitioner was sentenced to imprisonment for terms of two years on each of counts 1, 2, 3 and 5, and for terms of one year on each of counts 4 and 6, all terms to run concurrently (R. 65-66). The court of appeals affirmed the conviction and, on September 5, 1968, denied a timely petition for rehearing (Pet. App. 15-22; R. 74-79).

1. Petitioner primarily challenges the sufficiency of the evidence as to any of the counts upon which he was convicted. This issue is, of course, not normally one for this Court. It was fully presented to the court below and properly rejected, as the opinion of the court of appeals and the factual recitation in the petition itself amply demonstrate.

Petitioner was arrested while driving on a narrow, rural road leading only to an unmarked, secreted distillery; he was driving a specially outfitted automobile smelling strongly of moonshine and loaded with almost a ton of sugar and 24 pounds of yeast; when taken to the distillery he made a statement evi-

dencing a familiarity with one of the men earlier arrested at the site, and cavalierly asked for prompt release on bond so that he could set up a new distillery operation elsewhere, to replace the one just seized. Certainly this was sufficient to establish that, as charged in counts 2 through 4, petitioner was working at an unmarked distillery and carrying on the business of a distiller, and the combination of facts provided a sufficient basis for the jury to infer an intent to defraud and a lack of bond. See *United States* v. *Gainey*, 380 U.S. 63; *Rossi* v. *United States*, 289 U.S. 89; cf. *United States* v. *One Ford Coupe*, 272 U.S. 321, 330. As noted by the court below (Pet. App. 19), there is no need to review contentions relating to the remaining counts, since the sentences he received run concurrently with those imposed for the above. *United States* v. *Romano*, 382 U.S. 136, 138; *United States* v. *Gainey*, 380 U.S. 63, 65.

2. Petitioner's other contentions are equally without general importance or merit. His complaint that the district court failed to instruct the jury on the weight to be accorded circumstantial evidence is foreclosed by his failure to object to the charge, Fed. R. Crim. P. 30; in any event, the better practice to not to give the confusing instruction petitioner now wishes had been given, even when it is requested. *Holland* v. *United States*, 348 U.S. 121, 139-140. The district court's reference to the United States as a "corporation sovereign" and jurors as "stockholders" came during a brief discussion of jury selection and jury service at the beginning of the charge, and could not have been

prejudicial; no objection was made, and the issue is therefore foreclosed, Fed. R. Crim. P. 30.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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